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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3951

JAMES W. HALL, APPELLANT,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before BARTLEY, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

BARTLEY, *Judge*: Veteran James W. Hall appeals through counsel a September 8, 2015, Board of Veterans' Appeals (Board) decision denying service connection for type II diabetes mellitus, to include as due to in-service herbicide exposure. Record (R.) at 3-11. This appeal is timely and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will affirm the September 2015 Board decision.

I. FACTS

Mr. Hall served on active duty in the U.S. Army from July 1971 to April 1973 and from December 1974 to December 1975. R. at 815, 852. From December 1971 to December 1972, he served with Battery D, Second Battalion, 71st Air Defense Artillery, stationed in Korea. R. at 856. Service medical records (SMRs) do not reflect any complaints or treatment related to diabetes. *See* R. at 869-960.

In June 2003, he sought service connection for, inter alia, diabetes mellitus based on exposure to herbicides, specifically, Agent Orange. R. at 580. VA sent him a development letter asking for

information regarding his purported herbicide exposure, but he did not respond. R. at 574-79. In February 2007, he again requested service connection for diabetes mellitus based on herbicide exposure, contending that he was stationed in Korea near the Demilitarized Zone (DMZ). R. at 569-70. VA advised Mr. Hall how to substantiate his claim. R. at 560-68.

In June 2007, the VA regional office (RO) denied service connection for diabetes mellitus on a presumptive basis, because it was not shown that the veteran was stationed in the Korean DMZ during the period specified in the regulations, and on a direct basis, based on the absence of evidence showing a link between the condition and service. R. at 532-37. In August 2007, Mr. Hall filed what the RO characterized as "a new claim for benefits"; it again denied service connection for diabetes mellitus. R. at 1248-55. The veteran timely disagreed with this decision and submitted a letter from a private physician who opined that, because the veteran was exposed to Agent Orange during service in Korea, he "cannot rule out the possibility that there is a causative relationship." R. at 212, 321-23; *see also* R. at 225-65 (VA, treatise, and other general evidence regarding the use of Agent Orange).

The RO continued its denial, R. at 184-210, and Mr. Hall appealed to the Board, R. at 181. The veteran testified at a July 2012 Board hearing that he served in the Korean DMZ and that, although he could not remember any specific details about service, he knew his "body was changed dramatically since that time." R. at 120; *see* R. at 116-28. In September 2012, the Board remanded the diabetes mellitus claim. Recognizing that VA regulations permit presumptive service connection for specified conditions incurred by veterans who served in or near the Korean DMZ between certain dates, the Board instructed VA to obtain necessary information and thereafter refer the matter to the U.S. Army and Joint Records Research Center (JSRRC) for verification of exposure to Agent Orange. R. at 97-113.

The request for verification was submitted to JSRRC, which responded in January 2013 as follows:

> We reviewed the 1971-1972 unit histories submitted by the 2nd Battalion, 71st Air Defense Artillery (2nd Bn, 71st ADA). The histories document that the battalion Headquarters was located north of Uijongbu, Korea at Camp Red Cloud, approximately nineteen-miles from the [DMZ]. Battery D (Btry D), 2nd Bn, 71st ADA was located at ASP063, approximately ten-miles southwest of Uijongbu and 3.5 miles from Tactical Site #34. However, the histories do not document the use,

> storage, spraying, or transporting of herbicides. In addition, they do not mention or document any specific duties performed by Btry D, 2nd Bn, 71st ADA along the DMZ.

R. at 73, 75. In March 2013, the RO JSRRC coordinator issued a memorandum advising that, based on the JSRRC's January 2013 negative response, the veteran's allegations of in-service herbicide exposure could not be verified. R. at 71-73. Accordingly, VA continued to deny service connection for diabetes mellitus. R. at 65-69. In April 2013, Mr. Hall asserted that he had been stationed at "Camp Hill," 13 miles south of the Korean DMZ, and assigned to a tactical site 8 miles north of Camp Hill. R. at 56. In other words, he claimed that he had been stationed for some period of time 5 miles south of the Korean DMZ.

In the September 2015 decision on appeal, the Board denied service connection for diabetes mellitus. The Board found that the evidence of record did not demonstrate that diabetes mellitus manifested within one year of service as required for service connection under presumptive service connection for chronic diseases under 38 C.F.R. § 3.309(a) or that the veteran experienced continuity of symptoms as required under 38 C.F.R. § 3.303(b). R. at 4, 9. With respect to service connection on a presumptive basis, as discussed below, the Board found that Mr. Hall's period of service in Korea fell outside the presumptive period specified in VA regulations and that the evidence of record did not show that his unit either (1) served in or near the DMZ or (2) used, stored, sprayed, or transported herbicides. R. at 9-11. With respect to service connection on a direct basis, the Board found no probative evidence that the veteran was exposed to herbicides during service and, thus, that service connection on a direct basis was not warranted. R. at 10. This appeal followed.

II. ANALYSIS

Mr. Hall's single argument on appeal is that the Board offered inadequate reasons or bases when it failed to consider—or, alternatively, improperly rejected—his lay assertions that he served in closer proximity to the Korean DMZ than indicated in the January 2012 JSRRC report. Appellant's Brief (Br.) at 3-7; Reply Br. at 1-2. The Secretary disputes these contentions and urges the Court to affirm the Board decision. Secretary's Br. at 5-8. The veteran's arguments are not persuasive.

With respect to any finding on a material issue of fact and law presented on the record, the Board must support its determination with an adequate statement of reasons or bases that enables the claimant to understand the precise basis for that determination and facilitates review in this Court. 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence it finds persuasive or unpersuasive, and provide reasons for rejecting material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a link between the claimed in-service disease or injury and the present disability. *Romanowsky v. Shinseki*, 26 Vet.App. 289, 293 (2013). Regarding the second element, VA has provided by regulation that certain veterans may be presumed to have been exposed to herbicides, such as Agent Orange, during service. 38 C.F.R. § 3.307(a)(6) (2016). Veterans presumptively exposed to herbicides are also entitled to the presumption that specified conditions diagnosed after service—such as diabetes mellitus—are linked to service. *See* 38 C.F.R. § 3.309(e) (2016). In the present case, Mr. Hall's claim turns on whether the evidence showed he was, or could be presumed to have been, exposed to herbicides.

According to § 3.307(a)(6)(iv):

> A veteran who, during active military, naval, or air service, served between April 1, 1968, and August 31, 1971, in a unit that, as determined by the Department of Defense [(DOD)], operated in or near the Korean DMZ in an area in which herbicides are known to have been applied during that period, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.[1]

[1] The regulation does not define the term "near." In VA's notice of proposed rulemaking, it explained that the Korean DMZ is approximately 155 miles long and 2.5 miles wide and that, although the historical record did not show that herbicides were applied within the DMZ, it showed that "herbicides were applied between April 1968 and July 1969 along a strip of land 151 miles long and up to 350 yards wide along the southern edge of the DMZ north of the civilian control line." Herbicide Exposure and Veterans With Covered Service in Korea, 74 Fed. Reg. 36,640, 36,641 (July 24, 2009). VA noted that, where applied, herbicides were hand sprayed or hand distributed in pelletized form; "[t]here was no aerial spraying." *Id.*

DOD has effected such a determination with respect to several units, most of which were assigned to either the 2nd or 7th Infantry Divisions; no unit of the 71st Air Defense Artillery is included in DOD's list. *See* Herbicide Exposure and Veterans With Covered Service in Korea, 74 Fed. Reg. 36,640, 36,642 (July 24, 2009) (listing units); *see also* VA ADJUDICATION PROCEDURES MANUAL REWRITE (M21-1MR), Pt. IV, sbpt. ii, ch. 1, sec. H.4.b (same). For claims based on alleged herbicide exposure outside of the dates and locations specified, once sufficient information has been obtained, the matter is referred to the JSRRC to determine whether exposure to herbicides can be verified. *See* M21-1MR, Pt. IV, sbpt. ii, ch. 1, sec. H.7.a; *cf. Combee v. Brown*, 34 F.3d 1039, 1043-44 (Fed. Cir. 1994) (holding that service connection for radiogenic diseases may be established either via "direct actual causation" or via the presumption of service connection for such diseases).

In the present case, the Board found that Mr. Hall's service in Korea—December 1971 to December 1972—did not fall within the presumptive period set forth in § 3.307(a)(6)(iv), April 1, 1968, to August 31, 1971. R. at 8, 9. On this basis, the Board concluded that the veteran was not entitled to a presumption of herbicide exposure. *Id.* Nor is there any contention on Mr. Hall's part that his unit was among those explicitly determined by DOD to have operated in or near the Korean DMZ. *See* 74 Fed. Reg. at 36,642. With respect to direct service connection, the Board acknowledged the veteran's belief that his service, approximately four months after the pertinent presumptive period ended, was near the DMZ. R. at 9. However, the Board concluded that such belief was outweighed by the January 2013 JSRRC finding that his unit—Battery D, 2nd Battalion, 71st Air Defense Artillery—was not stationed in or near the Korean DMZ and did not use, store, spray, or transport herbicides and did not undertake duties along the DMZ. R. at 8, 10; *see* R. at 73.

In light of these findings, the Board concluded that the record did not show that the veteran had been, or could be presumed to have been, exposed to herbicides and, thus, that service connection for diabetes mellitus based on such exposure was not warranted. R. at 8-9. The Court discerns no clear error in these determinations. *See Rose v. West*, 11 Vet.App. 169, 171 (1998). Furthermore, the Court deems the Board's decision in this regard supported by adequate reasons or bases. *See Caluza*, 7 Vet.App. at 506; *Gilbert*, 1 Vet.App. at 52. Mr. Hall's arguments to the contrary are unavailing.

Initially, the Court observes that Mr. Hall does not dispute that he began service in Korea in December 1971, after the period for presumed exposure in or near the Korean DMZ. *See* 38 C.F.R. § 3.307(a)(6)(iv); R. at 856. Thus, even if meritorious, the veteran's arguments that the Board erred in its consideration of evidence that purportedly demonstrated he served near the DMZ would be of no moment with respect to presumptive service connection, because service in or near the Korean DMZ *after* August 31, 1971, would still fail to establish entitlement to the presumption of herbicide exposure as a matter of law. *See* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (explaining that "the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination"); *see also Newhouse v. Nicholson*, 497 F.3d 1298, 1301 (Fed. Cir. 2007) ("The statute does not limit the Veterans Court's inquiry to the facts as found by the Board, but rather requires the Veterans Court to 'review the record of the proceedings before the Secretary and the Board' in determining whether a VA error is prejudicial." (quoting 38 U.S.C. § 7261(b)(2))).

Even on the merits, the veteran's arguments fail. He first asserts that the Board did not acknowledge his assertions that he was stationed at a tactical site five miles south of the Korean DMZ. Appellant's Br. at 4-5; *see* R. at 56. The Board decision did not recount the veteran's precise assertion of where he was stationed, but it acknowledged his contention that he served near the Korean DMZ beginning in December 1971. R. at 8 ("[He believes that his service near the DMZ beginning in December 1971 . . . is sufficient to establish exposure to Agent Orange during service."). This adequately indicates that the Board considered Mr. Hall's assertions. Therefore, even though the Board is presumed to have considered all evidence of record and is not required to discuss every piece of evidence, *see Newhouse*, 497 F.3d at 1302; *Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001), its recognition of his statements that he served near the DMZ is sufficient to contradict his argument in this regard.

Mr. Hall next asserts that, to the extent the Board considered his assertion, it erred in rejecting his lay statements based on "lack of corroboration by the JSRRC or other documentation." Appellant's Br. at 6. However, the Court does not agree with the premise of this argument. The January 2013 JSRRC report did not merely fail to corroborate the veteran's assertions; it contradicted them, as the Board found when it noted that the JSRRC provided a *negative* response. R. at 10. The

JSRRC report found that the histories for the veteran's unit from 1971 through 1972 showed no evidence of use, storage, spraying, or transporting of herbicides or that the unit had any duty along the DMZ; and service personnel records clearly demonstrate that Mr. Hall was assigned to Battery D, 2nd Battalion, 71st Air Defense Artillery from December 1971 to December 1972, the whole of the period in which he served in Korea. R. at 856. Upon investigation, the JSRRC found that, during 1971 and 1972, Battery D was stationed 10 miles south of the city of Uijongbu, which was, in turn, south of 2nd Battalion Headquarters, which was itself 19 miles away from the Korean DMZ. R. at 73. Contrary to Mr. Hall's contention, the January 2013 JSRRC report is not simply the absence of evidence. *Cf. Horn v. Shinseki*, 25 Vet.App. 231, 239 n.7 (2012); *Buczynski v. Shinseki*, 24 Vet.App. 221, 224 (2011). Thus, even if evidence relating to the location of Mr. Hall's service in Korea were considered under the standards applicable to consideration of SMRs, *see Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (holding that the Board could not reject a veteran's lay evidence about an in-service medical condition solely because that incident was not reported in the veteran's service medical records), the Board was free to accord greater probative value to the JSRRC report that concluded that his unit had no duties along the Korean DMZ than to Mr. Hall's assertions, because the report constituted substantive negative evidence contradicting the veteran's assertion that he was exposed to herbicides and that he was stationed near the DMZ, *see Gardin v. Shinseki*, 613 F.3d 1374, 1379-80 (Fed. Cir. 2010) (approving the Board's analysis under *Buchanan* where it found the veteran's lay statements not credible because they were contradicted by contemporaneous SMRs). The Board did so, R. at 10, and, thus, the veteran's arguments are not persuasive.

More importantly, this Court has rejected the argument that "a veteran's lay evidence that any event occurred must be accepted unless affirmative documentary evidence provides otherwise." *Bardwell v. Shinseki*, 24 Vet.App. 36, 40 (2010). Thus, *Bardwell* held that the Board did not err in rejecting a veteran's lay assertion that he was exposed to gases or chemicals during his service on the basis that such exposure was not documented in his personnel records because "a non-combat veteran's lay statements must be weighed against other evidence, including the absence of military records supporting the lay assertions." *Id.* In light of *Bardwell*, and, more importantly, the January 2013 JSRRC report contradicting the veteran's assertions, the Court discerns no error in the Board's

conclusion that herbicide exposure could not be presumed despite Mr. Hall's assertions of being stationed near the Korean DMZ.

The Court has considered the veteran's remaining arguments and finds them to be without merit.

III. CONCLUSION

Upon consideration of the foregoing, the September 8, 2015, Board decision is AFFIRMED.

DATED: November 30, 2016

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